

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ARTEMIO ARROYO,

No. C 07-03718 SBA (PR)

Petitioner,

**ORDER DENYING REQUEST FOR  
CERTIFICATE OF APPEALABILITY**

v.

BEN CURRY,

(Docket no. 10)

Respondent.

Petitioner, proceeding pro se, filed a petition for a writ of habeas corpus pursuant to title 28 U.S.C. § 2254. The Court granted Respondent's motion to dismiss the petition. Petitioner has filed a notice of appeal and a request for a certificate of appealability (COA).

A petitioner may not appeal a final order in a federal habeas corpus proceeding without first obtaining a COA. See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). Section 2253(c)(1) applies to an appeal of a final order entered on a procedural question antecedent to the merits. See Slack v. McDaniel, 529 U.S. 473, 483 (2000).

"Determining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." Id. at 484-85. "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. at 484. As each of these components is a "threshold inquiry," the federal court "may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Id. at 485. Supreme Court jurisprudence "allows and encourages" federal courts to first resolve the procedural issue, as was done here. See id.

1 In its March 18, 2009 Order, the Court granted Respondent's Motion to Dismiss because  
2 Petitioner's federal petition was procedurally barred. The Court found that Respondent had  
3 satisfactorily established that California's procedural bar against successive petitions as applied in  
4 practice was an adequate state ground for rejecting Petitioner's January 18, 2006 state habeas  
5 petition, which allegedly challenged his 2003 parole denial.<sup>1</sup> The Court further determined that this  
6 bar should be imposed against Petitioner because he failed to demonstrate that an exception to the  
7 procedural default rule was available to him.

8 In his request for a COA, Petitioner claims this Court "erroneously granted Respondent's  
9 motion to dismiss." (Req. for COA at 2.) Petitioner states: "The United States District Court  
10 erroneously found that petitioner's second habeas petition was deemed successive because the  
11 Superior Court found that he challenged the same 2003 parole denial as in his first habeas petition."  
12 (Id. at 4.) He adds that "[a]t no time neither on his state court petitions nor at his federal petition  
13 [did] petitioner attached [sic] a copy of his 2003 parole consideration hearing transcript. Then how  
14 could petitioner be challenging the 2003 parole denial?" (Id. at 3.)

15 Furthermore, Petitioner takes issue with the following statement in the Court's March 18,  
16 2009 Order: "The Court notes that nowhere in his federal petition nor in the attached exhibits did  
17 Petitioner claim that his second habeas petition challenged the 2005 parole denial." (Id. at 3  
18 (quoting Mar. 18, 2009 Order at 2).) He claims that "[i]n his petitions to the California Court of  
19 Appeals and to the California Supreme Court petitioner clearly state[s] that the last parole  
20 consideration hearing was held on July 12, 2005 [and] [t]hat a copy of the Parole Suitability Hearing  
21 Transcript [from the 2005 hearing] was [attached] at Exhibit 'H'." (Id. at 3.)

22 Petitioner seems to be arguing that he attempted to exhaust his claim challenging the 2005  
23 parole denial; however, the state superior court erred in its procedural ruling finding that his second  
24 state habeas petition was successive. Therefore, Petitioner claims that this Court erred in granting  
25 Respondent's motion to dismiss his federal petition as procedurally barred.

---

27 <sup>1</sup> A copy of Petitioner's second state habeas petition filed on January 18, 2006 was not originally  
28 submitted as an exhibit when the Court resolved Respondent's motion to dismiss.

1 In an Order dated February 11, 2010, the Court directed Respondent to file a response to  
2 Petitioner's request for a COA. Specifically, Respondent was directed as follows:

3 (1) to respond to Petitioner's arguments in his request for a COA; (2) to show cause  
4 why the Court should not construe Petitioner's request for a COA as a motion for  
5 reconsideration of the Court's March 18, 2009 Order Granting Respondent's Motion  
to Dismiss; and (3) to attach a copy of Petitioner's second habeas petition filed in  
the San Joaquin County Superior Court on January 18, 2006.

6 (Feb. 11, 2010 Order at 2.)

7 On March 4, 2010, Respondent filed an opposition to Petitioner's request for a COA and  
8 attached a copy of the January 18, 2006 state habeas petition. In the opposition, Respondent "denies  
9 that Petitioner is entitled to either a COA or reconsideration of the Order dismissing his Petition."  
10 (Opp'n at 2.) Respondent argues that Petitioner "fails to demonstrate that jurists of reason would  
11 find it debatable whether the procedural ruling was correct." (Id. at 3.) Respondent further argues  
12 that "while it appears that Arroyo's superior court petition did indeed challenge his 2005 hearing,  
13 rather than his 2003 hearing, he failed to challenge this error at any level in the state courts." (Id.  
14 (citing Resp't Exs. 2, 3).) Respondent further points out that Petitioner "did not file a motion for  
15 reconsideration in the superior court, . . . nor did he address the superior court's decision in the  
16 California Court of Appeal or California Supreme Court. (Id. (citations omitted).) Because  
17 Petitioner never presented his procedural claim squarely to the state courts, Respondent argues that  
18 "any attempt to raise it at the federal level is improper." (Id. (citing House v. Bell, 547 U.S. 518,  
19 522 (2006) (It is well established that "federal habeas courts, as a general rule, are closed to claims  
20 that state courts would consider defaulted."))).)

21 In its March 18, 2009 Order Granting Respondent's Motion to Dismiss, this Court pointed  
22 out that Petitioner's failure to address the superior court's alleged error in the state courts was "fatal  
23 to Petitioner's case because it left him with no avenue in federal court to contest the state superior  
24 court's alleged error in finding his second habeas petition successive." (Mar. 18, 2009 Order at 7.)  
25 The Court further noted that even if Petitioner could have supported his assertion that the state  
26 superior court erred in barring his petition as successive, "the outcome would not change given that  
27  
28

1 federal court review of a petition deemed procedurally barred by a state court 'should be limited to  
2 the language of the state court opinions' and not 'based on a post hoc examination of the pleadings  
3 and record.'" (Mar. 18, 2009 Order at 7 n.2 (citing Bennett v. Mueller, 322 F.3d 573, 584 (2003).)  
4 Because the Court was limited to the language in the state superior court's opinion rejecting  
5 Petitioner's January 18, 2006 state habeas petition as successive, jurists of reason would not have  
6 found it debatable whether the Court was correct in finding that his federal petition was procedurally  
7 barred.

8 In sum, the Court has reviewed its Order Granting Respondent's Motion to Dismiss. The  
9 petition was dismissed because Petitioner's federal petition was procedurally barred. The Court  
10 found that Respondent has satisfactorily established that California's procedural bar against  
11 successive petitions as applied in practice was an adequate state ground for rejecting Petitioner's  
12 January 18, 2006 state habeas petition. The Court further determined that this bar should be  
13 imposed against Petitioner because he failed to demonstrate that an exception to the procedural  
14 default rule was unavailable to him. And, as mentioned above, while Petitioner again attempts to  
15 argue in his COA request that the state superior court erred in its procedural ruling, he fails to  
16 demonstrate that jurists of reason would find it debatable whether this Court's procedural ruling was  
17 correct. Accordingly, the request for a COA is DENIED.

18 The Clerk of the Court shall forward to the Ninth Circuit Court of Appeals the case file, the  
19 Court's Order Granting Respondent's Motion to Dismiss, and this Order. See United States v. Asrar,  
20 116 F.3d 1268, 1270 (9th Cir. 1997).

21 This Order terminates Docket no. 10.

22 IT IS SO ORDERED.

23 DATED: 3/16/10

  
SAUNDRA BROWN ARMSTRONG  
United States District Judge

1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 ARTEMIO ARROYO,

5 Plaintiff,

6 v.

7 BEN CURRY et al,

8 Defendant.

Case Number: CV07-03718 SBA

**CERTIFICATE OF SERVICE**

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
10 Court, Northern District of California.

11 That on March 17, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
14 located in the Clerk's office.

15 Artemio M. Arroyo C 20149  
16 Correctional Training Facility (Soledad)  
17 BW-221  
18 P.O. Box 689  
19 Soledad, CA 93960

20 Dated: March 17, 2010

21 Richard W. Wieking, Clerk  
22 By: LISA R CLARK, Deputy Clerk  
23  
24  
25  
26  
27  
28